No. 14,904

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIE RAY SMITH,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLEE'S BRIEF.

LLOYD H. BURKE,
United States Attorney,
By ROBERT E. WOODWARD,
Assistant United States Attorney,
404 Federal Building,
Sacramento 6, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

QUESTION ON APPEAL.

Appellant sets forth his position for appeal as being the lack on the part of the defendant of the specific intent to steal the car and transport it thereafter.

ARGUMENT.

I.

STATUTORY INTENT WAS DETERMINED BY JURY UNDER PROPER INSTRUCTIONS.

Section 2312 of Title 18 USC, the interstate transportation of a stolen motor vehicle act, does require a showing that a defendant to be guilty knew the automobile was stolen and intended to transport it interstate with such knowledge. That is a question of fact, which, under proper instructions was left to the jury and determined to be present in the mind of the defendant by the jury when it returned a verdict of guilty. Actually, this fact alone indicates that there is no merit to this appeal, as no error in the instructions is claimed.

II.

APPELLANT'S CASES ARE NOT IN POINT.

Appellant has cited a number of cases and we have no quarrel with them as such. It is appellee's contention that they are not pertinent to the issue raised,

and a discussion of them, case by case, to set forth their inapplicability would not be of assistance to the Court. Suffice it to say the facts in *Hite v. U. S.,* 168 F. 2d 973 point this out, since both title and possession were intended to pass to the defendant, who was charged with violation of Section 2312, Title 18, United States Code. Substantially, the facts in the other cases cited are as inappropriate.

III.

APPELLANT KNEW RIGGS HAD POSSESSORY INTEREST ONLY AND THAT TITLE TO THE AUTOMOBILE WAS IN ANOTHER.

The government witness Roy A. Riggs, who, in effect, was substantiated by Special Agent Nathan White, testified that he held a possessory interest in the automobile in question as a conditional purchaser. There is no question but what the Budget Finance Company held title under this contract and appellant knew this. Appellant was to return the automobile to the Budget Finance Company at Phoenix, Arizona, from Oklahoma where it had been taken by appellant at Riggs' request. Riggs testified, and we must assume his testimony to be true since the jury evidently accepted it, (*Collier v. U. S.,* 190 F. 2d 473, 476) that he was paid nothing by the appellant and it was understood the car should be returned to Budget Finance Company and then if appellant desired to take over the payments that was

a matter strictly up to the legal owner, Budget Finance Company.

IV.

ASSUMING APPELLANT HAD NO GUILTY INTENT AT THE TIME HE CAME INTO LIMITED POSSESSION OF THE AUTOMOBILE, HIS INTENT TO STEAL WHEN HE WENT BEYOND THE SCOPE OF HIS AUTHORITY MAY BE INFERRED AND TRANSPORTATION INTERSTATE THEREAFTER IS A VIOLATION OF THE STATUTE IN QUESTION.

A. It thus is obvious, for the purposes of this case, that the appellant had lawful possession of the automobile but for a limited purpose; i.e., delivery of the automobile to Budget Finance Company at Phoenix, Arizona. The evidence is undisputed that appellant took the automobile to Phoenix, Arizona; that he did not contact Budget Finance Company, but drove the automobile thousands of miles over most of the United States in driving it to Alabama and return by a circuitous route. During the course of this trip the Arizona license plate was changed to that of Missouri and another plate belonging to the co-defendant was also found in the car.

B. During all of this time, appellant had possession of the Conditional Sales Contract and knew two payments were due on the automobile. Upon return to Phoenix after this extended trip appellant did not contact Budget Finance Company, his second opportunity.

C. When appellant received possession of the automobile from Roy A. Riggs to deliver it to Arizona, appellant may or may not have had criminal intent to steal the automobile and it is not necessary that such a showing be made. For if the appellant intended to convert the automobile to his own use before he came into this District, he is guilty of transporting the motor vehicle in interstate commerce as charged. (*Davilman v. U. S.*, 180 F. 2d 284, 285; *Breece v. U. S.*, 218 F. 2d 819; *Collier, et al. v. U. S.*, 190 F. 2d 473; *Wilson v. U. S.*, 214 F. 2d 313.)

D. The narrow definition of larceny sought to be followed by appellant in citing cases such as *Hite v. U. S.*, 168 F. 2d 973 is inappropriate from two viewpoints.

1. The better reasoning is contained in such cases as *Davilman v. U. S., supra,* which take a more liberal view in interpreting "larceny" as it pertains to Section 2312, and

2. Because such cases presuppose the intent on the part of the one giving possession to the person accused to part with title as well.

E. Here, Riggs had no title with which to part and appellant was well aware Riggs held only a possessory interest. It must be remembered appellant might qualify as an expert in such matters, as he had been previously convicted of four felonies consisting of grand theft, conviction under this same Statute then known as the "Dyer Act," and two separate convictions for theft of automobiles.

The appellant was but a bailee, who, at the time he obtained possession, may have had the criminal intent to steal the automobile which was entrusted to him. Being charitable, we may assume he has no criminal intent at that time. But his intent to appropriate the automobile to his own use is shown by his actions in returning to Phoenix, ignoring his instructions as bailee, and driving across the country. If this is not enough, his return to Phoenix the second time and the departure to California where he was arrested can leave no doubt, reasonable or otherwise, as to his state of mind. Judge Augustus Hand in *U. S. v. Sicurella, et al.*, 187 F. 2d 533, 534, an analogous case, neatly defines common law "larceny", as follows:

> "Moreover, it was always larceny when there was an intent at the time a bailee acquired possession of the property of another to convert it to his own use and the bailee thereafter did convert it and the owner had given over the property with no intention that title should pass. See e.g., *Hite v. United States,* 10 Cir., 168 F. 2d 973; *United States v. Patton,* 3 Cir., 120 F. 2d 73; *Reg. v. Ashwell,* 16 Q.B.D. 190."

Here, Riggs held only a possessory interest and could not pass title, even if he so desired. Appellant knew this. It is axiomatic that though possession originally may have been lawful, a guilty intention by the bailee to appropriate the subject matter of his bailment and its appropriation is larceny at that time.

CONCLUSION.

Appellee respectfully submits that the order appealed from was properly based upon the law and the evidence and that it should be affirmed.

Dated, Sacramento, California,
March 19, 1956.

LLOYD H. BURKE,
United States Attorney,
By ROBERT E. WOODWARD,
Assistant United States Attorney,
Attorneys for Appellee.